1960

United Steelworkers of America et al v. Board of Review of the Industrial Commission of Utah et al : Brief of Appellants

Utah Supreme Court

In the Supreme Court
of the State of Utah

Case No. 9322

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 5486, for and on behalf of its members employed by Utah Copper Division, Kennecott Copper Corporation, 60-BR-230;

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, LOCALS 485 and 392, for and on behalf of its members employed by Utah Copper Division, Kennecott Copper Corporation, and OFFICE EMPLOYEES INTERNATIONAL UNION LOCAL 286, for and on behalf of its members employed by Utah Copper Division, Kennecott Copper Corporation, 60-BR-237;

ELVERE R. DAVIS, on his own behalf, employed by Utah Copper Division, Kennecott Copper Corporation, 60-BR-231;

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (Local 1438), for and on behalf of its members employed by Utah Copper Division, Kennecott Copper Corporation, and DEON L. WIMMER and LEONARD HUSSEY, 60-BR-235;

UNITED STEELWORKERS OF AMERICA, LOCALS 4347, 4413, 5120 and 4329, for and on behalf of its members employed by Utah Copper Division, Kennecott Copper Corporation, 60-BR-236,

Appellants

vs.

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and the UTAH COPPER DIVISION OF KENNECOTT COPPER CORPORATION,

Respondents

BRIEF OF APPELLANTS

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In the Supreme Court
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BRIEF OF APPELLANTS

THE FORM OF THE RECORD BELOW

The case on review consolidates five class and one individual decision. Pursuant to stipulation of the parties, one joint petition was filed.

In order to refer with facility to the transcripts, exhibits and documents of record, the following references will be observed:

(1) Board of Review File #60-BR-230, containing the record of United Steelworkers of America, Local 5486, will be referred to as BR-230 (R. 1 et seq.)

(2) Board of Review File #60-BR-231, containing the record of Elvere R. Davis, will be referred to as BR-231 (R. 1 et seq.)

(3) Board of Review File #60-BR-235, containing the record of International Brotherhood of Electrical Workers, Local 1438, will be referred to as BR-235 (R. 1, et seq.)

(4) Board of Review File #60-BR-236, containing the record of United Steelworkers of America, Locals 4347, 4413, 5120 and 4329, will be referred to as BR-236 (R. 1 et seq.)

(5) Board of Review File #60-BR-237, containing the record of International Union of Mine, Mill and Smelter Workers, Locals 485 and 392, and Office Employees International Union, Local 286, will be referred to as BR-237 (R. 1 et seq.)

NATURE OF THE CASE

The appellants here seek to review orders of the Utah Industrial Commission which affirmed decisions of its Appeals Referee, denying claimants above eligibility for unemployment benefits.

Initially the Unemployment Compensation Division awarded benefits effective November 22, 1959, to Kennecott's technical laboratory employees, represented by Steelworkers Local #5486. Similar awards allowing benefits to Kennecott clerical employees at the Utah smelter, represented by Steelworkers Local 4329 were made effective December 28, 1959. Both awards, however, were reversed by a decision of the Appeals Referee on January 15, 1960 and March 10, 1960. All other claimants were denied benefits by the Unemployment

Compensation Division and Appeals Referee; timely petitions to the Board of Review were filed; and in each case, on July 8, 1960, the Appeals Referee's decisions denying benefits to all claimants were affirmed.

STATEMENT OF THE CASE

Nineteen separate local and autonomous labor unions had working agreements and contracts between each union and Kennecott Copper Corporation, Utah Division, which expired by their terms on June 30 and July 31, 1959.

It will be necessary to designate these local unions through their contractual relationship with the company for easy reference.

United Steelworkers of America

Local 4413 represents 713 production and maintenance workers at the company's refinery.

Local 5120 represents 47 clerical workers at the company's refinery.

Local 4347 represents 1160 production and maintenance workers at the company's smelter.

Local 4329 represents 34 clerical workers at the company's smelter.

Local 5486 represents 35 laboratory and technical workers at the company's Arthur mills.

International Union of Mine, Mill and Smelter Workers

Local 392 represents 1398 production and maintenance employees at the company's Arthur-Magna mills.

Local 485 represents 1188 production and maintenance workers at the company's Bingham mine.

International Brotherhood of Electrical Workers

Local 1438 represents 68 power station employees at the Central Power Station.

Office Employees International Union

Local 286 represents 99 clerical and office workers at the company's Bingham mine.

Elvere R. Davis was employed as a carpenter in the company's mill and was a member of Local 392, Mine-Mill Union.

In addition to these unions, the company had working agreements with local unions: 692 Mine-Mill Local, 1845 Electrical Workers, Lodge 670 Brotherhood of Locomotive Firemen & Enginemen, Lodge 506 Order of Railroad Carmen & Brakemen, Lodge 1045 Brotherhood of Railroad Carmen of America, Local 3 Operating Engineers, Local 1081 Electrical Workers, Lodge 568 Machinists, Lodge 155 System Federation, and Lodge 844 Brotherhood of Locomotive Firemen and Enginemen.

Beginning in April, 1959, all unions involved attempted to negotiate new working agreements. When on August 1, 1959, all parties were still in negotiations, each of the former agreements was extended on a day-to-day basis to August 10, 1959. On this latter date, because of a strike called, the company ceased its operation, except for certain maintenance and supervisory work.

The history of bargaining between the separate locals and Kennecott Copper Corporation goes back to the late 1930's and was conducted on the basis of individual union bargaining. At times each of the local unions presented certain common bargaining demands such as in the field of health and welfare

benefits through a "Unity Council," but as each negotiation was concluded, separate contracts were signed by the company and each local union claiming bargaining rights. The particular contracts which are of record demonstrate that each union was the sole bargaining agent for the particular employees certified through the National Labor Relations Board election procedures.

There is some conflict in the testimony as to whether Electrical Workers Local 1438 ever formally struck the company or directly participated in the work stoppage. On October 31 ,1959, Electrical Workers Local 1438, BR-235 (R. 017-018) advised the company it was not on strike, and, in turn, ordered the Unity Council not to list that local as one of the striking unions in their advertisements, publicity or demands to the company. Previously this local through its business manager, one T. E. Burke, had orally disaffirmed the local's involvement in the strike and mailed the letter to the company to verify the fact. The company's letter to this local on November 2, 1959, acknowledged that this local was not considered a striking union and effected a day-to-day extension of the old agreement. BR-235 (R. 018). Arrangements for the return of day-to-day people to the Central Power Station followed this exchange of correspondence, and provisions of the old contract were thus reinstituted for these electrical workers. Following the shutdown, the company halted power production and maintained its power needs through purchase from Utah Power & Light Company. By November 12, 1959, six or seven members of the Electrical Local had returned to work at the Central Power Station but the remaining 65 to 70 employees were not recalled until the total strike settlement around January 29,

1960. No employee of Local 1438 performed picket duties at any time and the returning employees crossed the picket lines after November 12th, BR-235 (R. 071). These workers continued on the job until the end of the strike. Local 1438 finally settled their new agreement with the company January 7, 1960. The company supplied power to its departments through purchases from the Utah Power & Light Company until January 29, 1960, maintaining that on the basis of the power necessary, the plant could be more adequately operated by power purchase and consequently took the position there was no work available for the 65 to 70 other members of this unit. Notwithstanding this disavowal of the strike, the resumption of day-to-day contract, and the return of men recalled by the company by November 12, the Unemployment Compensation Division ruled that the remaining 60-70 members were disqualified because of their participation in the strike.

Kennecott Copper Corporation's production activities in Utah prior to August 10, 1959, were carried on chiefly, as follows: the ore is mined at Bingham Canyon, Utah; then hauled by rail some 15 miles north to the concentration mills at Magna and Arthur, Utah; concentrates are transported to the smelter; and the main smelter product is taken to the refinery. The mills, smelter and refinery are all situated within a radius of about three miles. Prior to January 1, 1959, the smelter was owned and operated by the American Smelting & Refining Company, as it had been for many years previously. The smelter was purchased on that date by Kennecott and operated by the company thereafter.

The claimants here number in excess of 4,000 employees and are members of various separate and autonomous local

unions. The electrical workers are a trade union. The steel workers are an industrial union. Similarly, other workers belong to trade, craft and industrial unions. Some are affiliated with the AFL-CIO and others are not. Indeed, on many occasions historically the unions have battled each other for work jurisdiction rights. Some contracts provide for job evaluation while other contracts create job rate classications. Insurance, health and welfare payments are maintained by different carriers and are under different programs. Hiring practices differ on the basis of plant and departmental requirements. The smelter has its superintendent, the refinery its superintendent, as do the mines and mills. Seniority practices differ with each contract. As to total plant shutdowns, particular plant seniority exists. As to advances in position, departmental seniority exists. Employees in the smelter cannot bump across to the refinery, nor can seniority be claimed between mine or mill, nor can departmental employees bump across departmental lines.

Negotiations to settle the strike were carried on between the company and the individual unions involved after August 10 with the assistance of federal mediators.

The following chart shows the date each union reached contract settlement with the company:

United Steel Workers of America	
Local 4413	November 21, 1959
Local 5120	November 21, 1959
Local 4347	November 21, 1959
Local 4329	November 21, 1959
Local 5486	November 21, 1959

International Union of Mine, Mill and Smelter Workers	
Local 392	December 16, 1959
Local 692	December 16, 1959
Local 485	December 16, 1959
International Brotherhood of Electrical Workers	
Local 1845	December 22, 1959
Brotherhood of Locomotive Firemen & Enginemen	
Lodge 670	December 24, 1959
Order of Railroad Carmen & Brakemen	
Lodge 506	December 24, 1959
Brotherhood of Railroad Carmen of America	
Lodge 1045	December 27, 1959
Operating Engineers	
Local 3	December 30, 1959
Office Employees International Union	
Local 286	January 4, 1960
International Brotherhood of Electrical Workers	
Local 1438	January 8, 1960
Local 1081	January 18, 1960
International Association of Machinists	
Local 568	January 27, 1960
System Federation	
Lodge 155	January 27, 1960
Brotherhood of Locomotive Firemen & Enginemen	
Lodge 844	January 27, 1960

It will be noted above that the Steelworkers Locals' settlements on November 21, 1959, paved the way for the strike's end.

The smelter employees (Steelworkers Locals 4347 and 4329) following ratification of their agreements November 21, 1959, returned to work pursuant to a strike settlement agreement which called for their "prompt return," BR-236 (R. 033). Between November 22 and November 24, 1959, 708 smelter employees were back at work while 167 were scheduled off. All but 96 of the 1170 on the smelter payroll had returned to work by November 30, 1959 BR-236 (R. 059). The smelter clerical employees were called back according to seniority qualifications in line of work.

On the afternoon shift, December 1, 1959, pickets of the Brotherhood of Locomotive Firemen & Enginemen and Order of Railroad Carmen and Brakemen were established at the smelter. This was the first date railroad brotherhood workers picketed the smelter property since the strike commenced August 10, 1959. However, smelter employees did not leave their jobs when the pickets appeared. The railroad brotherhoods commenced their picketing when it was learned that the company was attempting to utilize motor transport common carriers to move smelter products. The steelworkers, well aware that it would be futile to attempt to cross a picket line without inviting violence, respected the line. By December 25, 1959, the railroad brotherhoods signed strike agreements, withdrew the pickets and a general recall of the production and maintenance and clerical workers began at the smelter and refinery.

During the week ending January 10, 1960, there were 371 employees of Steelworkers Local 4347 laid off after completing five working days. Layoffs were according to plant seniority. The reason given was that the supply of ore at the smelter was exhausted. Each employee was given a blue separation slip supplied by the Unemployment Office, indicating the separation was due to a reduction in force due to strike at other plants, BR-236 (R. 058). During the week ending January 16, 1960, 550 additional production and smelter employees were laid off on the same basis. On January 18, 1960, there were 242 employees still working at the smelter on maintenance, cleanup and material inventory. On January 20, 1960, six junior clerical and technical employees from the smelter were told not to report to work because there was no work for them. They were given blue separation slips. On January 31, 1960, 274 employees remained on the payroll of the smelter. Between February 1 and 4, 1960, the employees laid off were recalled according to their plant seniority and returned to work. On February 4, 1960, there were 114 employees out of 1153 who had not returned to the smelter. All of the facts set forth above are digested from the record BR-236 (R. 058-061), Company Exhibits K and L.

The refinery story is digested at BR-236 (R. 040-042). Following ratification of the refinery contract, November 21, 1959, over 400 of the Steelworkers Local 4413 employees were called back to the refinery the week of November 23, 1959. The remaining 300 were not called back "because no work was available for them." BR-236 (R. 078). Refinery employees suffered the same fate as smelter employees when the railroad brotherhoods picketed the refinery early in De-

cember. With the removal of these picket lines December 25, refinery employees were also recalled BR-236 (R. 105-106). Two of the three refinery furnaces were closed January 4 to 15, 1960, with one continuing to January 29, 1960. Production and maintenance work was resumed at the refinery on February 8, 1960.

Anticipating vacation shutdown schedule for August 10-23, 1959, prior to the strike, company had stockpiled concentrates at the smelter which enabled the smelter and refinery to operate on a steady basis for a two-week period. BR-236 (R. 104). During December, 1959, and January, 1960, the company also shipped for refining approximately 9800 tons of copper anodes outside the state, BR-236 (R. 105).

The Mine-Mill unions were the second group to reach final contract agreement with the company on December 16, 1959, but none of these employees were recalled to work until February 6, 1960. Following contract ratification by Mine-Mill unions, other unions maintained picket lines at the mines and mills which were withdrawn as each local union settled its contract.

Final contract settlements were made January 27, 1960, with the Machinists, System Federation and Brotherhood of Locomotive Firemen and Enginemen, paving the way for the return of Kennecott's employees to the mines and mills on February 6, 1960.

Steelworkers Local 5486, representing the unit of clerical and laboratory employees at the mills, also ratified and approved the contract with other steelworkers unions November 21, 1959, and expressed willingness to resume their former

work and perform their former duties at the Mills, BR-230 (R. 011), but as late as January 13, 1960, had not been recalled to their jobs. Originally the Unemployment Compensation Department declared these claimants eligible for unemployment benefits on the ground there was no work available for them. This decision was later reversed by the Appeals Referee and affirmed.

Elvere R. Davis (60-BR-231) maintains that he had been separated from his employment with the company three days before the strike and was given a blue separation notice BR-231 (R. 001). Mr. Davis' claim was also denied even though he had been separated from work prior to the strike.

Office Employees Local 286 are engaged in the mine area BR-237 (R. 083) and reached a contract settlement January 3, 1960. They had discontinued picketing within a few days after the strike commenced, August 10. Following contract ratification, Local 286 president contacted the Railroad Brotherhoods to seek passes through the picket lines but they were rejected.

The critical point found in all cases by the Appeals Referee is that all operations of Utah Division, Kennecott Copper Corporation, constitute a single establishment, on the basis of general and specific business administration and company control as well as proximity, integrality and interdependence of the company's various production departments. The Appeals Referee concluded in all cases that the entire Utah Division of the company consists of one establishment at which the claimants were last employed, BR-237 (R. 087), and further, it concluded that all claimants became unemployed due to a

stoppage of work which existed because of a strike involving their grade, class, or group at that establishment. The disqualification was applied to all claimants as of August 10, 1959, and continued through February 6, 1960. Timely appeals from the Board of Review's decision were taken in all cases.

STATEMENT OF POINTS

The Board of Review erred as a matter of law and fact in denying the claimants benefits in holding:

1. That Utah Copper Division, Kennecott Copper Corporation, operation in Utah constitutes a single factory or establishment within the meaning of the Act, Section 5 (d).

2. That the work stoppage did not end until February 6, 1960, when the plant resumed "normal operations" for:

(a) The workers represented by United Steelworkers of America, Local 5486;

(b) The workers represented by International Brotherhood of Electrical Workers, Local 1438;

(c) The workers represented by International Union of Mine, Mill and Smelter Workers, Locals 485 and 392;

(d) The workers represented by International Union of Office Employees, Local 286;

(e) The workers represented by United Steelworkers of America, Locals 4329, 4347, 4413 and 5120; and

(f) Elvere R. Davis, individually, and as a member of his local union.

3. That the unemployment of the claimants represented

by the local unions set forth in 2. (a through f above) was due to a work stoppage that resulted because of a strike involving his grade, class or group of workers at the factory or establishment at which he is or was last employed.

ARGUMENT

I.

The Board of Review erred as a matter of law and fact in denying the claimants benefits in holding:

(1) That Utah Copper Division, Kennecott Copper Corporation, operation in Utah constitutes a single factory or establishment within the meaning of the act, Section 5 (d).

Section 35-4-5(d) of the Utah Employment Security Act provides:

> "5. An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
>
> "(d) For any week in which it is found by the commission that his unemployment is due to a stoppage of work which exists because of a strike involving his grade, class, or group of workers at the factory or establishment in which he is or was last employed.
>
> "(1) If the commission, upon investigation, shall find a strike has been fomented by a worker of any employer, none of the workers of that grade, class, or group of workers of the individual who is found being a party of such plan or agreement to foment a strike, shall be eligible for benefits; provided, however, that if the commission, upon investigation, shall find that such strike is caused by the failure or refusal of any employer to conform to the provisions of any law

of the State of Utah, or of the United State, pertaining to hours, wages or other conditions of work, such strike shall not render the workers ineligible for benefits.

"(2) If the commission upon investigation, shall find that the employer, his agent, or representative, has conspired, planned or agreed with any of his workers, their agents or representatives, to foment a strike, such strike shall not render the workers ineligible for benefits."

The pivotal and basic question of law to be resolved from all of the facts in this consolidated petition requires a determination as to whether Utah Copper Division, Kennecott Copper Corporation's operations in Utah constitutes a single factory or establishment within the meaning of the act.

Claimants have carefully reviewed the prior rulings of this court annotated and cited, *Operating Engineers, Local Union No.* 3, *v. Industrial Commission of Utah,* 318 P. 2d 336, and conclude that the factual situation existing here distinguishes these cases from the prior cited cases which seem to settle the law.

In *Operating Engineers, Local Union No.* 3, *supra,* the court held that the strike of one union would be intended as a pressure beneficial to all 11 unions. The case answers only the question of the group involved and does not resolve the issue of "a single establishment."

Nor do any of the cases therein cited, in our view, namely, *Iron Workers v. Industrial Commission,* 104 Utah 242, 139 P. 2d 208; *Olof Nelson Construction Company v. Industrial Commission,* 121 Utah 525, 243 P. 2d 951, and *Teamsters,*

etc., v. Orange Transportation Company, 5 Utah 2d 45, 296 P. 2d 291, answer the question raised here.

Those cases were decided on the basis of what constitutes a "group" within the meaning of the statute. To our knowledge the Utah Supreme Court has not definitely wrestled with the problem before of a "single establishment," and determination of this question is the basic predicate upon which the qualification or disqualification of the claimants involved must be decided.

The common denominator used by the Appeals Referee and the Board of Review is contained in BR-236 (R. 052), company Exhibit B, entitled "The Utah Copper Story 1959." This document was received in evidence by the Appeals Referee to assist him insofar as he adopted "integral functioning" as a basic test of the extent of an "establishment." Apparently the Appeals Referee and Board of Review considered the evidence and testimony relating to management and operation of the Utah Copper Division as the chief test. All the findings in all the cases involved the finding in BR-236 (R. 109):

> "On the basis of both general and specific business administration and control as well as proximity, integrality and interdependence of various production departments, it must be considered that the entire physical plant of the Utah Copper Division of the Kennecott Copper Corporation constitutes one establishment at which the claimants in this case were employed."

These findings entirely disregard the various departments, mine, mills, central power station, metallurgical laboratory, smelter, refinery and maintenance shops as separate establishments and in so doing run against the employer and employee

relationship differences demonstrated by the record. The Appeals Referee was impressed that the mine, mills, refinery, smelter, power station, haulage system, etc., were all simply interdependent units within the general establishment. This may be in keeping with some decisions on this point, but there is substantial law to the contrary.

A comparison of the pertinent contract provisions existing between the various local unions and the company will demonstrate that:

(1) The union recognized as the sole bargaining agent for the employees of a particular unit, in most cases, arose out of National Labor Relations Board election procedures, and in some cases it is a matter of common knowledge that jurisdiction for these jobs was hard fought between the unions themselves.

(2) In all steelworkers' contracts, rates of pay are determined by job evaluation studies. The steelworkers are a vertical industrial union. Central Power House Station, Local 1438, is not an industrial union, but is a craft of electrical workers. This is true of the machinists local and railroad local.

(3) The wages established for craft locals is a bargained rate without regard to increments and job evaluation.

(4) There is contractual difference in the health and welfare insurance, and the carriers who provide the coverage for the various claimants and their several local unions.

It is uncontroverted that employees at the refinery do not have the right to bump across to the smelter or mine or mill or vice-versa. The refinery was during the period of time involved in this dispute headed by a separate superintendent

as was the smelter, as was the mine, the mill department, the central power station, etc. Hiring practices were clearly separate and distinct. Seniority differs pursuant to each contract. Vacation and fringe benefits are not identical, nor did the company introduce in evidence any uniform working rules applicable to all the departments.

Scrutiny of this record will disclose these historic and contractual differences among the employees, indeed even among the various locals. True, we have here one single employing unit, but that does not necessarily render that single employing unit a separate establishment within the meaning of the law. A partnership which operates three bowling alleys and a bottling concern may be a single employing unit, but each of the establishments may be separate. See *Canada Dry Bottling Company v. Board of Review,* 223 P.2d 586.

See *Nordling v. Ford Motor Company,* 231 Minn. 68, 42 N.W. 2d 576, 28 A.L.R. 2d 272, which holds:

> "The question whether the assembly plant was an establishment separate from the manufacturing plant, or whether both were parts of the same establishment, should be determined, under all the facts available, from the standpoint of unlike employment rather than of management; that the test of functional integrality, general unity and physical proximity should not be adopted as absolute, but merely as elements to be taken into consideration with other factors."

The Supreme Court of Michigan, recently reversing its former ruling in *Chrysler Corporation v. Smith,* 297 Mich. 438, 298 N.W. 870, 28 A.L.R. 2d 327, now establishes a highly sensible rationale in view of the liberal construction

necessarily required in making determinations as to unemployment compensation eligibility.

A thoughtful reading of *Park v. Appeal Board of Michigan* (January 12, 1959), 359 Mich. 103, 94 N.W. 2d 407, points up the complexity of the problem surrounding a finding of "establishment."

Certainly it is good public policy to see the end of an involved lengthy strike such as this. The steelworkers local, who were obtaining meager strike benefits from their international, were automatically cut off from those benefits on November 21, 1959, through their settlement. Yet they were penalized until February 6, 1960, by the Appeals Referee finding that the plant only then returned to normal operations. A denial of unemployment compensation for those for whom work was unavailable constitutes a double penalty of the loss of statutory benefits as well as union benefits. Should the steelworkers have refused to have settled until all 19 unions settled, and thus risk a delay in ultimately ending the strike in order to retain their own strike benefits because the policy of the law was to continue their disqualification? We think the question answers itself, and particularly where the evidence shows that commencing November 23 through 27, the smelter and refinery had resumed substantial operations with their production, maintenance and clerical crews. Even if refusal to cross the picket lines of the railroad brotherhoods set up December 2 and withdrawn December 25, 1959, was disqualifying, how does the Board sustain continuing disqualification after all picket lines were withdrawn from the refinery and smelter on December 26, 1959, and those two units returned

to substantial operations to smelt and refine the ore concentrates stockpiled for the company's original vacation shutdown planned in August, 1959? How did the company regard these smelter and refinery workers after the concentrates and ore supply was exhausted? They laid off men pursuant to seniority and qualifications, gave each of them a blue separation slip, conceded that, "there was no work available," and observed seniority in recall.

And, how did the Board of Review regard Local Union 1438, Electrical Workers? That decision contains no finding that these claimants disaffirmed the strike and by letters of October 31 and November 2, 1959, actually reinstituted employer relationship on a day-to-day basis, returning six or seven employees to the Central Power House because no others were needed; yet, the company purchased substantial power from the local public utility to meet its demands. How the Board concluded in this case that other members of Local 1438 refused to cross a picket line is an anomaly. If the company had no work available for the remaining 60 to 70 men, having exercised its prerogative to purchase power, what does it matter that they refused to cross a picket line if there was no work available for them?

Elvere R. Davis was not even an employee of the company on August 7, 1959, when he received his separation notice. Yet, Mr. Davis was disqualified as if he were still a member of the local union involved in the strike.

The solution is not to be found merely in physical isolation of the various properties, nor geographical proximity, nor in the scheme of management, supervision and production. At

minimum, this court should remand these cases to the Board of Review to make findings and give consideration to the source of authority in hiring and discharging employees, to the manner of seniority practices, and other differences between the 19 unions and the company which demonstrate separateness. Under the circumstances *all* employment practices, rather than those of management and operation, are of primary importance in determining the unity and integrality or the lack of unity and lack of integrality of the claimants. The dependence of one or more of the company's departments upon Division Office control and supervision, does not necessarily make of the entire industry one plant or one establishment any more than by a pyramiding of corporate structures, the Utah Copper Division can be keyed to its Ray Mines Division, its South American operations, or, in turn, to its Eastern refineries. See *Tucker v. American Smelting & Refining Company,* 189 Md. 250, 55 A. 2d 692, where the court ruled employees of a Balitmore refinery eligible because of a strike in this same Utah smelter when both plants were owned by ASARCO. The danger with such easy reasoning is that we will ultimately pyramid upon any manufacturer who might regularly buy materials and supplies from certain suppliers, a result which the unemployment statutes do not contemplate.

With these factors in mind, let us consider *Park v. Appeal Board of Michigan* (supra).

At pp. 412-413:

> "Judges and lawyers can frequently do astonishing things with words. No layman would venture to suggest that the single word 'establishment', used in the paragraph above, could in normal usage be applied

to both the Ford Rouge plant in Dearborn, Michigan, and the Ford forge plant in Canton, Ohio.

"The writer believes also that no layman, without a specific motive in mind, would read the statutory provisions quoted above and come to the conclusion that the legislature had any such inclusiveness in its intended use of the word. Although the statute carries within it no definition of 'establishment,' its use of the term is, in our opinion, such as clearly to rule out the broad interpretation sought by appellees. Thus, the statute defines the term 'employing unit' in the same broad sense which appellees seek to apply to 'establishment':

> ' "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, * * * '

"And, in the second sentence of the same definition paragraph, it makes such use of the word 'establishment' as, in our view, to preclude any attempt at definition in terms of all integrated plants of a company, wherever located:

> 'All individuals performing services within this state for any employing unit which maintains 2 or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act.' "

See the identical definition contained under the Utah Act, 35-4-22(h).

At pp. 416-419:

"As we have previously noted, compensation was allowed in 8 of these 9 cases after rejection of the

argument that Ford Motor Company integration rendered the individual far-flung plants 1 establishment with the Ford Rouge plant in Dearborn, Michigan. The exception was the Georgia case, where the Georgia supreme court rejected liberal construction of the unemployment compensation act and flatly stated with a finality unhampered by excess concern for fine definition or logic:

> 'We therefore hold that the Hapeville plant, at which the claimants were employed, and the Dearborn parts-producing plant, where the strike occurred and which compelled cessation of work at the Hapeville plant, were inseparable and indispensable parts of one and the same "factory, establishment, or other premises" as contemplated by those terms as employed in the act now being construed.' Ford Motor Co. v. Abercombie, 207 Ga. 464, 470, 62 S.E. 2d 209, 215.

. . .

"The balance of the courts followed definition of the word 'establishment' very similar to that which we have referred to. The New Jersey supreme court held:

> 'The standard of "functional integration" is not to be found in the legislative expression. The statutory sense of the term "establishment" is not embracive of the whole of Ford's far-flung enterprise as a single industrial unit. It has reference to a distinct physical place of business. Such is its normal usage in business and in government. A. H. Phillips, Inc. v. Walling, 1945, 324 U.S. 490, 65 S. Ct. 807, 89 L. Ed. 1095. "Establishment" is defined as the "place where one is permanently fixed for residence or business;" also, "an institution or place of business." Webster's New International Dictionary, 2d ed.' Ford Motor Co. v. New Jersey Department of Labor and Industry, 5 N.J. 494, 502, 76 A.2d 256, 260.

"The Virginia supreme court, with reasoning we consider sound, held:

'The Unemployment Compensation Act, * * * was intended to provide temporary financial assistance to workmen who became unemployed without fault on their part. The statute as a whole, as well as the particular sections here involved, should be so interpreted as to effectuate that remedial purpose implicit in its enactment. When its purpose is kept in view, we cannot agree that managerial and operational integration and functional cooperation upon the official level are to be the chief factors upon which employment status and employees' rights are to be determined. Our problem is, in the final analysis, to recognize the remedial aim and purpose of the Act and then interpret and construe the language and apply it to the facts proved. In doing this, we do not think that the contractual obligations and relations brought about through execution of the master labor contract by Ford Motor Co. and UAW-CIO may be considered as determining whether or not the Norfolk plant and the Rouge plant constitute and are one establishment within the meaning of the statute. Those plants either constitute one establishment or separate establishments regardless of whether the master labor contract is or is not in force. The circumstances of employment, rather than those of management and operation, are of primary importance in determining the unity and integration, or the lack of unity and integration of the plants. The accumulative weight and effect of these circumstances we think, are sufficient to show that the Norfolk assembly plant is separate from the Rouge plant. No labor dispute or strike was fomented or participated in by the local union to which the claimant employees belong, nor was there any labor dispute on the premises, at the plant, or in the establishment where they were actually employed. The

labor dispute and resultant strike were in fact and in reality at and in Dearborn. The most that can be said is that the management and operation of the vast and far-flung Ford Motor industry is so integrated and synchronized that a serious strike at its headquarters and in its principal plants at Dearborn must in time affect the entire industry and cause the shutdown of plants and other establishments wherever situated. The dependence of one or more plants in this great industry upon the home office and principal manufacturing establishment does not, however, necessarily make of the entire industry one plant or one establishment.' Ford Motor Co. v. Unemployment Compensation Commission, 191 Va. 812, 824, 825, 63 S.E. 2d 28, 33.

"In a number of cases we have referred to, the act construed referred to 'factory, establishment or other premises, as was true in the draft version of the model statute. In the case arising from the shut down of the St. Paul, Minnesota, assembly plant, the word "establishment' was employed alone after amendment had deleted the accompanying words 'factory' and 'other premises'—in short, the same situation as prevails at present in relation to our Michigan statute.

"In a very similar fact situation with a very similar statutory provision to construe, the Minnesota court set forth the following analysis of the 'establishment' problem on which we do not think we can improve:

'Rather than distinguish the cases on differing facts, we prefer to place decision on the broader ground that we believe that the test of functional integrality, general unity, and physical proximity should not be adopted as an absolute test in all cases of this type. No doubt, these factors are elements that should be taken into consideration in determining the ultimate question of whether a factory plant, or unit of a larger industry is a separate establish-

ment within the meaning of our employer and security law. However, there are other factors which must also be taken into consideration. The difficulty with attempting to use, as an absolute test, the factors laid down in the Spielman case comes in its application to the facts of a particular case. Many enterprises have functional integrality between factories which are separtaely owned. Some are so integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned. That is the situation which we have in the instant case. Out of some 3,800 or 4,000 parts, about 900 come from the Rouge plant. Some come from other plants owned by the Ford Motor Company, and still others come from plants independently owned. A shutdown caused by a strike or other labor dispute at one of such independent vendors might conceivably cause a shutdown at the St. Paul Ford plant. This did actually happen in 1945, when a strike occurred at the Kelsey Hayes plant. We assume that it is not uncommon that the same international union would represent the employes of several independent plants or factories operating as the Ford plant does with its independent vendors, but we do not believe that anyone would contend that a strike at the plant of such independent vendor would disqualify employes of the Ford plant if it was forced to shut down on account of the lack of parts furnished by such independent vendor.

'Proximity is equally unsatisfactory. In order to apply this factor, what distance shall be considered short enough to constitute proximity? Shall the St. Paul branch of the Ford plant be close enough to the Rouge plant and the Georgia or Los Angeles plants, operating in a similar manner, be too far away, or shall any two plants anywhere in the United States be near enough?

'Nor is general unity of itself a test. Our statutes recognize that the same employing unit may maintain two or more separate establishments within the State. § 268.04, subd. 9. It might be argued that the legislature had in mind separate establishments which are not related in any way, but the legislature did not so state, and we do not believe it can be read into the statute. In A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 65 S. Ct. 807, 89 L.Ed 1095, 157 A.L.R. 876, supra, there was general unity, but that did not prevent the court from holding that the warehouse was an establishment separate from the retail part of the business.

'If, then, these tests standing alone do not suffice, is it a combination of all of them which makes them sufficient? If one is lacking, are the others sufficient, or must they all concur? We believe the better rule to be that these factors, together with other facts, must be taken into consideration in determining whether the unit under consideration is in fact a separate establishment from the standpoint of employment. The St. Paul branch of the Ford Motor Company is highly integrated with other units of the company for purposes of efficient management and operation, but is separate insofar as the employes are concerned for the purpose of employment. The employes are hired and discharged by the St. Paul manager. They are members of a local union which has no connection with the locals at Dearborn except that all locals are members of the same international, as are many others not connected with the Ford Motor Company. The seniority rights of the employes extend only to operations at the St. Paul plant. No showing has been made, nor do we believe that any can be made, that an employe at the St. Paul branch can "bump" an employe at the Rouge plant, the Los Angeles plant, the Georgia plant, or anywhere else

than at the St. Paul plant. Payment to the Minnesota unemployment compensation fund is made only for employes at the St. Paul plant, and, obviously, benefits can be drawn only by employes in the St. Paul branch from the Minnesota fund. Employment under the act relates to services performed within the State or localized here. The members of Local 879 had nothing to do with calling the strike at the Rouge plant and could do nothing to avert it. While the record does not so show, we assume that under our act the contribution rate of the employer is based on the experience ratio of employes within this state without any regard to the experience in other states.

'Under § 5(d) of the act proposed by the Social Security Board and under our original act, the unit of employment within which the labor dispute must exist in order to disqualify was designated as the "*factory establishment, or other premises* at which he is or was last employed." (Italics supplied.) Under our present act, § 268.09, subd. 1(6), the strike or labor dispute must be in progress "at the *establishment* in which he is or was employed." (Italics supplied). It is doubtful that the change in terminology was intended to enlarge or diminish the unit of employment affecting the disqualification. It has been held that the words "factory, establishment or other premises" in the Alaska act, which is similar to the Federal act, were ejusdem generis and that the principle of noscitur a sociis applies. Aragon v. Unemployment Compensation Comm., 9 Cir., 149 F.2d 447, supra.

'We are inclined to believe that in our original act the word "establishment" was intended to include those places of employment which could not be classified as a factory; that in the amendment the legis-

lature concluded that the term "establishment" was inclusive of factory and all other types of employer units; and that there was no further need to use the word "factory." For a discussion of the distinction between factory and establishment, see General Motors Corp. v. Mulquin, 134 Conn. 118, 55 A.2d 732, supra.

'The term "establishment" as used in our amended act should be given no broader meaning than it had in the original act, except that it now includes "factory" and "other premises" set out separately in the original act. Our Act, patterned after the act proposed by the Social Security Board, is in turn patterned after the British National Insurance Act of 1911 (1 & 2 George V, c. 55, pt. 2 § 87), which was amended in 1935 (25 George V. c. 8, pt. 3, § 26). Under both the 1911 and the 1935 British acts, disqualification is based upon a work stoppage due to a trade dispute at the *"factory workshop or other premises"* (italics supplied) at which the claimant is employed. The British umpire, which is the final arbiter under the British act, has consistently held that the words "factory, workshop or other premises," refer to single units of employment. The only substantial change in the language of our original act from the British act was that the word "establishment" was substituted for "workshop." It is difficult to believe that this change was intended to broaden the scope of the employment area so as to emcompass a whole industry rather than a single unit of employment.' Nordling v. Ford Motor Co., 231 Minn. 68, 85-89, 42 N.W. 2d 576, 586."

Appellants also make brief reference to *Tennessee Coal, Iron & Railroad Co. v. Martin,* 251 Ala. 153, 36 So. 2d 547. There the employer argued for disqualification of non-striking members of the United Mine Workers. Yet, their coal mining

operations were shut down as a result of strikes by other unions in the steel making and ore mining operations of the company. The Alabama supreme court rejected the integration argument, holding that the words of their act must be interpreted as they are "commonly used and understood."

See also, *Shell Oil v. Cummins,* 70 Ill. 2d 329, 131 N.E. 2d 64. There 12 metal trade unions were not barred by joint negotiations as directly interested or as members of the same grade.

II.

The Board of Review erred as a matter of law and fact in denying the claimants benefits in holding:

(2) That the work stoppage did not end until February 6, 1960, when the plant resumed "normal operations" for:

(a) the workers represented by United Steelworkers of America, Local 5486;

(b) the workers represented by International Brotherhood of Electrical Workers, Local 1438;

(c) the workers represented by International Union of Mine, Mill and Smelter Workers, Locals 485 and 392;

(d) the workers represented by International Union of Office Employees, Local 286;

(e) the workers represented by United Steelworkers of America, Locals 4329, 4347, 4413 and 5120;

(f) Elvere R. Davis, individually, and as a member of his local Union.

While this court has never been confronted with the necessity of interpreting the extent of the meaning of the words "stoppage of work" in connection with a particular strike ,there are cases in other jurisdictions which have decided the disqualification does not end at the time the labor dispute is settled, but continues while they are unemployed as a result of the labor dispute. See*Carnegie-Illinois Steel Corporation v. Review Board*, 117 Ind. App. 379, 72 N.E. 2d 622, and *Bako v. Board of Review* (Penn.) 90 A.2d 302.

But the foregoing cases are not necessarily determinative of the issues here since the basic qualification finding required in the first sentence of Section 35-4-5(d) "at the factory or establishment at which he is or was last employed" must be legally made before the casual proviso becomes effective and before considering or applying the test of direct involvement set forth in subsection (d)1.

III.

The Board of Review erred as a matter of law and fact in denying the claimants benefits in holding:

(3) That the unemployment of the claimants represented by the local unions set forth in 2. (a through f above) was due to a work stoppage that resulted because of a strike involving his grade, class or group of workers at the factory or establishment at which he is or was last employed.

Again we are concerned with the basic qualification finding required in the first sentence of Section 35-4-5(d) which must be made as the predicate before the further finding of involvement of grade, class or group of workers.

The variety of work performed by the complex employee units has no comparison or similarity in bargaining history and contractual results with similar job grade, class or group of workers in any other units involved in the strike. The ratification and strike settlement of each local union would seem to argue for the end of that particular unit's disqualification. *Lexes v. Industrial Commission of Utah,* 243 P.2d 964, does not appear to control since the jobs of the railroad switchmen were actually absorbed into the steelworkers' unit, and there is no comparable fact situation in any of the instant cases.

Analysis of the bargaining contracts of all these local unions, we believe, forecloses the Board of Review from making a broad finding that *all* employees collectively involved the same grade, class or group of workers at "the factory or establishment" at which he is or was last employed.

CONCLUSION

For the reasons cited in this brief, we submit this court should reverse the Board of Review's decision and order that each grade, class and group of workers at each of the separate establishments, within the Utah Copper Division of Kennecott, be determined eligible for unemployment compensation benefits commencing with the date that each local ended its strike against the company and ratified a strike settlement agreement.

Respectfully submitted this 20th day of December, 1960.

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